

# MERCHANT SERVICES AGREEMENT

## 1. Definitions and interpretation

1.1 In this Merchant Services Agreement, capitalised words have the meaning given to them as defined below:

**Account** means an account through which the Merchant can access the Merchant Portal and manage its Merchant Store;

**Agreement** means the Order Form and this Merchant Services Agreement including any Schedules;

**Alternate Platform** has the meaning set out in clause 3.5;

**Approved Deductions** means amounts to be deducted from any Net Sales, as contemplated under this Agreement;

**Autoship Order** means an Order that the Buyer has selected to be automatically repeated at a frequency selected by the Buyer, until cancelled by the Buyer;

**Business Day** means any day other than a Saturday, Sunday or public holiday observed in Auckland, New Zealand;

**Buyer** means a purchaser of Products from the Merchant via the Platform;

**Buyer Cancellation Request** has the meaning set out in clause 9.4;

**Buyer Created Tax Invoice** means a document in respect of which section 24(2) of the GST Act applies;

**Buyers Account** means an account the Buyer uses to login and store information to transact with the Merchant over the Platform;

**Claim Process** has the meaning set out in clause 20.4;

**Commencement Date** means the date set out in the Commercial Terms;

**Commercial Terms** means the commercial details set out in Section B of the Order Form;

**Commission** has the meaning set out in clause 5.2;

**Confidential Information** means information that:

- (a) is by its nature confidential;
- (b) is marked by either party as 'confidential', 'in confidence', 'restricted' or 'commercial in confidence' or similar;
- (c) is provided by either party or a third party 'in confidence'; or

- (d) either party knows or ought to know is confidential.

**Data Breach** has the meaning set out in clause 21.8;

**Dispatched or Dispatch** means marked as shipped with a recognised logistics provider (including couriers) and with a valid tracking number;

**Duty or Duties** means customs duty or duties charged on goods imported into New Zealand;

**Electronic Marketplace** has the meaning given in the GST Act;

**Fees** means any fees applicable to the Products, including courier or logistics fees, and/or any other fees incurred by TheMarket where TheMarket ships any Products on behalf of the Merchant other than the Shipping Charges;

**Fulfilled by TheMarket** has the meaning given to it in the 'Fulfilment by TheMarket - Terms and Conditions', the terms of which are incorporated by reference in the Order Form;

**GST** means goods and services tax chargeable or imposed under the GST Act;

**GST Act** means the Goods and Services Tax Act 1985;

**Initial Term** means the initial term set out in the Commercial Terms;

**International Merchant** means a Merchant that is located outside of New Zealand only and is non-resident for New Zealand GST purposes;

**IP Claim** has the meaning set out in clause 20.4;

**Law** means any applicable statute, regulation, by-law, ordinance, subordinate legislation, common law, rule of equity, mandatory standard or mandatory code of conduct, New Zealand Customs notice, the rules of any stock exchange, and includes the Consumer Guarantees Act 1993, Fair Trading Act 1986, the Contract and Commercial Law Act 2017, the Privacy Act 2020 and any specific product and electrical safety standards and regulations that apply in New Zealand;

**MARKETPOINT** means a Pick Up Drop Off location specified by TheMarket;

**Materials** has the meaning set out in clause 20.1;

**Merchant** has the meaning set out in the Order Form;

**Merchant Cancelled** means marked as unable to dispatch via the Merchant Portal or API;

**Merchant Indemnity Fund** has the meaning set out in clause 19.1;

**Merchant Promotion Coupon** means a promotional coupon in respect of some or all of the Merchant's Products offered to Buyers and funded by the Merchant;

**Merchant Marketing Contribution** means the amount set out in the Commercial Terms for marketing purposes];

**Merchant Portal** means the location on the Platform that the Merchant uses to log in and review Orders, Products and any other relevant detail that it uses to manage its Merchant Store or otherwise transact with Buyers through the Platform;

**Merchant Rating** means the rating out of 5 given by Buyers for interactions they have with the Merchant;

**Merchant Store** means the online page on the Platform through which the Merchant offers Products for sale to Buyers;

**Monthly Platform Fee** has the meaning set out in clause 14.13;

**Net Sales** has the meaning set out in clause 14.1(b);

**Net Proceeds** means the amount paid to the Merchant as set out in clause 14.1(e).

**Order** means an order for Products made by the Buyer through the Merchant Store;

**Order Form** means the order form entered into by TheMarket and the Merchant to which this Merchant Services Agreement relates;

**Platform** means the online marketplace platform (both application and web-based) which allows a merchant to list products (including through APIs) and to sell them to Buyers;

**Platform Promotion Coupon** means a promotional coupon in respect of some or all of the Products listed on the Platform offered to Buyers and funded by TheMarket;

**Policies** means policies issued by TheMarket to the Merchant from time to time;

**Privacy Policy** means The Warehouse Group's privacy policy available at <https://help.themarket.com/hc/en-us/articles/360023763333-Privacy-Policy> as may be amended from time to time;

**Products** means those products and/or product categories listed in the Commercial Terms and other authorised products listed for sale by the Merchant but which must not include products on the Restricted Products List nor any other products that TheMarket, at its sole discretion, restricts the Merchant from selling from time to time under this Agreement;

**Refund Processing Fee** means the amount set out in the Commercial Terms;

**Related Company** has the meaning set out in section 2(3) of the Companies Act 1993;

**Restricted Products List** means the list of products prohibited from being offered for sale via the Platform set out at <https://help.themarket.com/hc/en-us/articles/4408626109849-Restricted-Products>, as updated by TheMarket from time to time;

**Sales Proceeds** means the total amount of the transaction conducted between the Buyer and the Merchant through the Platform;

**Settlement Currency** means the currency agreed between the parties for settlement of Net Proceeds;

**SLA** means the minimum standards of operation that are required by the Merchant to transact on the Platform, as set out in Schedule A;

**Shipping by Market** has the meaning set out in clause 10.1;

**Shipping Charges** means any delivery fees charged to the Buyer for a transaction through the Platform;

**Shipping Subsidy** means a freight subsidy that the parties have agreed to in writing that TheMarket will credit to the Merchant where the Merchant has delivered a Subscription Order that: (i) meets the requirements set by TheMarket from time to time; and (ii) is under an agreed Order value threshold;

**Subscription Orders** has the meaning set out in clause 11.1;

**Subscription Programme** means a membership programme that allows Buyers to have free shipping on Subscription Orders, as well as other benefits;

**Standard Terms** means TheMarket's standard terms and conditions of sale for products sold through the Platform, as are accessible through the Platform;

**Target Launch Date** means the date set out in the Commercial Terms;

**Tax Invoice** has the meaning given in the GST Act;

**Taxable Supply** has the meaning given in the GST Act;

**TheMarket** means Themarket.com Limited (NZCN 6414596 NZBN 9429046327406);

**TheMarket Central** means the central returns centre in New Zealand as advised by TheMarket to the Merchant from time to time;

**Uncollected Order** has the meaning set out in clause 12.4; and

**Warehouse Group Discount Staff Benefit** has the meaning set out in clause 13.2.

## 1.2 Interpretation

In this Agreement:

- (a) a person includes any natural person, body corporate, unincorporated association or partnerships;
- (b) the singular includes the plural and vice versa;
- (c) a reference to a clause, unless the context otherwise requires, is a reference to a clause in this Agreement;
- (d) the word “includes” or “including” does not limit the meaning of the words preceding it;
- (e) a reference to any monetary amount is a reference to New Zealand dollars unless expressly stated otherwise; and
- (f) any reference to a Law shall be construed as referring also to any amendment or re-enactment (whether before or after the date of this Agreement) of that Law.

## 2. Commencement and Term

2.1 By using the Platform:

- (a) the Merchant agrees to be bound by the terms of this Agreement (and any variations), irrespective of whether or not the Merchant has signed this Agreement; and
- (b) the Merchant acknowledges and agrees that:
  - (i) the Merchant is contracting directly with a Buyer for the sale of Products and, in doing so, the Merchant must comply with this Agreement and the Standard Terms;
  - (ii) this Agreement is intended to confer a benefit on the Buyer who has a right under the Contract and Commercial Law Act 2017 to enforce his or her rights under this Agreement.

2.2 This Agreement starts on the Commencement Date and will continue in full force and effect until either party terminates this Agreement in accordance with clause 24.

2.3 The Merchant will use reasonable commercial efforts to ensure that the Products are available for purchase through the Merchant Store on the Platform by the Target Launch Date.

2.4 The Merchant agrees to pay the Merchant Marketing Contribution within 3 months of the Commencement Date.

## 3. Grant of Rights

### *General provisions*

3.1 TheMarket grants the Merchant the right to offer the Products on the Platform through the Merchant Store and access the Merchant Portal to manage the Merchant Store, subject to and in accordance with the terms of this Agreement.

3.2 The Merchant may, from time to time, request that further product categories are added to the list of Products. If TheMarket accepts such product categories (in writing), those product categories (and the associated products) will become Products for the purposes of this Agreement.

3.3 The Merchant acknowledges that TheMarket has the right in its sole discretion to determine the content, appearance, design, functionality, performance characteristics, maintenance requirements and all other aspects of the Platform, including by redesigning, modifying, removing or restricting access.

3.4 The Merchant accepts that if required by any of TheMarket’s banking or payment processing providers, TheMarket may at any time suspend or remove the Merchant from, or prevent the Merchant from transacting on, the Platform with or without notice.

### *Opting-in to listing on Alternate Platform*

3.5 Where the parties agree in writing for the TheMarket to list the Products on an alternate online marketplace platform other than the platform operated by TheMarket (**Alternate Platform**), the following terms apply:

- (a) The terms of the Agreement shall apply, subject to the following modifications which shall take precedence in the case of any conflict between this clause and the remainder of the Agreement.
- (b) References to the “Platform” in this Agreement shall include an Alternate Platform.
- (c) References to “Standard Terms” in this Agreement shall, in respect of Products that TheMarket lists on the Alternate Platform, mean the Alternate Platform’s standard terms and conditions for products offered through the Alternate Platform, as are accessible through the Alternate Platform (where relevant and applicable).
- (d) TheMarket may, at its discretion, list the Merchant’s Products on the Alternate Platform, but is not required to. TheMarket may, for any reason (and for no reason), refuse to list Products on the Alternate Platform and withdraw listings of Products from the

Alternate Platform. TheMarket makes no warranty or representation that it will list Products on the Alternate Platform at all or for any period of time.

- (e) Where TheMarket does list the Merchant's Products on the Alternate Platform, any applicable Merchant promotions and sale prices relating to a Product will also apply to those Products while listed on the Alternate Platform. However, the benefit of any club or loyalty programmes will not apply to sales of Products on the Alternate Platform, unless otherwise agreed by TheMarket.
- (f) Where Products are sold via the Alternate Platform, such sales will be displayed on the Merchant Portal and the Net Proceeds for sales made via the Alternate Platform will be paid to the Merchant by TheMarket.
- (g) For clarity:
  - (i) Any rights or obligations that a party has under this Agreement shall apply as between the parties equally in respect of Product listings on the Alternate Platform. However, where the Standard Terms for products sold through the Alternate Platform allow for different terms relating to cancellations, refunds, returns and warranty claims by Buyers than those otherwise offered by TheMarket, then (subject to complying with any relevant Law) the Merchant may comply with those Standard Terms for Products sold through the Alternate Platform instead of any conflicting provisions in clause 17 or the SLA.
  - (ii) TheMarket may, at its sole discretion, apply a "change of mind" policy that allows Buyers of Products sold on the Alternate Platform to return their Orders within 60 days of delivery. Where a Buyer has returned Orders, the Merchant must notify TheMarket who will then provide a refund to the Buyer. Further details of the "change of mind" policy, disregarding the applicable returns period, are set out at <https://help.themarket.com/hc/en-us/articles/360023456034>Returns-Policy>. This sets out any express exclusions in terms of Products to which it applies.
  - (iii) The Shipping by Market and Fulfilled by TheMarket provisions under this Agreement may apply to the shipping of Products sold via the Alternate Platform.
  - (iv) TheMarket may perform certain obligations through its nominees,

including taking payment from Buyers, issuing receipts to Buyers on behalf of the Merchant and processing refunds to Buyers on the Alternate Platform. For the purposes of clause 9.1, when a Buyer places a valid Order on the Platform for the Merchant's Products, the Merchant will be committed to fulfil the Order at the time the Order process is completed on the Platform and the Buyer has been issued with a confirmation email.

- (v) Opting in to listing through the Alternate Platform does not incur an additional platform fee.
- (h) Further to clause 20 (Intellectual Property Rights), where third party rights owners make a claim against the Alternate Platform in relation to any Material, content, Product or any other material listed, posted, displayed, published or conveyed on the Alternate Platform, such claim shall also be considered an "IP Claim" for the purposes of this Agreement.
- (i) The Merchant may withdraw its approval for TheMarket to list its Products on the Alternate Platform by giving TheMarket 30 days' notice in writing.

#### 4. Merchant Registration and Accounts

- 4.1 The Merchant must register an Account by providing TheMarket with all information reasonably requested by TheMarket.
- 4.2 The Merchant agrees to keep all registration details for the Account up to date within the Platform and keep all Account passwords and details secure at all times.
- 4.3 The Merchant will notify TheMarket immediately and take immediate steps to re-secure its Account (including changing its password) if the Merchant suspects or becomes aware of any unauthorised use of any of its Accounts or that its passwords are no longer secure.
- 4.4 The Merchant acknowledges that prior to accepting a Merchant's registration, TheMarket may conduct an inspection of the Merchant's operations.
- 4.5 TheMarket reserves the right to accept or reject the Merchant's registration for any reason (or no reason) at TheMarket's absolute discretion. TheMarket will typically reject registration if it believes:
  - (a) the Merchant's products are unsafe or may infringe any Law;
  - (b) the Merchant's products, policies and procedures are not in-line with TheMarket's Policies;

- (c) the Merchant is unwilling or unable to meet its obligations under this Agreement; or
- (d) is otherwise a high-risk merchant as determined by TheMarket from time to time.
- 4.6 TheMarket may revoke an accepted registration immediately on notice, or suspend a Merchant from trading on the Platform, if, following acceptance, in the opinion of TheMarket, any of clauses 4.5 (a) to (d) applies or is reasonably likely to apply.
- 4.7 On registration, the Merchant and/or the persons registering the Merchant on the Merchant's behalf warrant that:
- (a) the Merchant is a duly constituted company under New Zealand Law (or the Law of the Merchant's country of residence);
- (b) the Merchant holds all requisite power and authority to enter into this Agreement, be bound by its terms and the Standard Terms, and to perform the Merchant's obligations.
- 4.8 From time to time, TheMarket (or a third party) may perform credit checks on the Merchant (and in some circumstances, may require certain financial documents as evidence). By entering into this Agreement, the Merchant accepts that TheMarket may perform such credit checks and consents to such performance by TheMarket.
- 5. Commission**
- 5.1 The Merchant agrees that in consideration for access to the Platform and receipt of any services, TheMarket is entitled to receive the Commission.
- 5.2 The Commission is the % amount of Net Sales as set out in the Commercial Terms.
- 5.3 Where a Platform Promotion Coupon has been applied to an Order, it will be added onto the Net Sales for the purposes of calculating the Commission.
- 5.4 TheMarket may amend the Commission at any time on 60 Business Days' notice to the Merchant, such notice to take effect only after the end of the Initial Term.
- 5.5 If the Merchant does not agree to any change in the Commission, then the Merchant may terminate this Agreement in accordance with clause 24.1.
- 6. Merchant's Obligations and Restrictions**
- 6.1 The Merchant agrees:
- (a) to use reasonable commercial endeavours to sell, and promote the sale of, Products through the Platform;
- (b) to provide information relating to its activities and transactions in connection with the Platform, promptly following a request for the same from TheMarket;
- (c) to ensure its terms and conditions with Buyers for Products sold through the Platform are not inconsistent with the Standard Terms;
- (d) to honour the Standard Terms and any other terms and conditions offered to Buyers;
- (e) to take reasonable action to ensure that facilities for repair of Products and supply of spare parts for the Products are available for a reasonable period after the Products are purchased through the Platform;
- (f) to comply with all Laws and industry standards applicable to its obligations under this Agreement and to the advertising, marketing, supply, sale, import and export of the Products, including ensuring its listings are up-to-date and not misleading or deceptive in any way;
- (g) to comply at all times with all Policies, including the Product Recall Policy;
- (h) not to list or offer for sale any products which are illegal, "grey" market, parallel imports, counterfeit goods, on the Restricted Products List, or which are likely to, or do, infringe any Law or the intellectual property rights of any person;
- (i) to ensure that it only supplies Products under an Order that will not expire for a reasonable time period;
- (j) to have adequate age verification systems and processes to ensure no Products are sold to underage Buyers (where such Products have age restrictions e.g. alcohol / adult);
- (k) to list the minimum proportion of its catalogue or minimum number of products as agreed in the Order Form;
- (l) not to post or transmit:
- (i) any content on its Merchant Store that is or that TheMarket considers to be defamatory, offensive, obscene, inappropriate or which infringes the intellectual property or other rights of any person;
- (ii) unsolicited advertising, promotional materials or any other forms of solicitation;
- (m) not to use the Platform, or include anything in any packaging accompanying the Product, or provide any offer, in a manner which is intended to or may have the effect of bypassing any Buyer transactions or to

- promote its own or any third-party platforms or shopping platforms;
- (n) not to damage or adversely affect the operations, reputation or goodwill of TheMarket, other Merchants, TheMarket's bankers or any of TheMarket's Related Companies.
- 6.2 TheMarket may conduct spot checks of the Merchant Store and Account for compliance with this Agreement.
- 6.3 Where TheMarket reasonably believes clause 6.1 has been, or is likely to be, breached TheMarket may (as applicable) suspend the Merchant's activities on the Platform, or moderate or remove any content on the Platform, without prior notice.
- 7. Minimum Service Obligations**
- 7.1 The Merchant must at all times:
- (a) adhere to the standards set out in the SLA, including maintaining a Merchant Rating consistent with the minimum level set out in the SLA;
- (b) manage inventory levels and promotional sales to ensure that all Orders can be fulfilled in accordance with the SLA;
- (c) respond to and handle Buyer complaints and issues promptly, fairly and in accordance with the Law, the Policies, the Standard Terms and this Agreement.
- 7.2 TheMarket may suspend the Merchant's Account if it fails to comply with this clause 7.
- 8. Product Listings**
- 8.1 The Merchant will list Products for sale on its Merchant Store through the Merchant Portal.
- 8.2 TheMarket may:
- (a) at its sole discretion, amend the Products listed in the Commercial Terms, on 30 days' notice to the Merchant;
- (b) direct the Merchant to cease selling certain Products or product categories from time to time through its Merchant Store (and the Merchant will comply within the timeframe set out in such direction). TheMarket will provide as much notice as is practicable in the circumstances.
- 8.3 The Merchant must clearly and accurately provide the following information (where appropriate) for each listing:
- (a) product description including size, qualities, technical specifications, colours, dimensions and images;
- (b) any required safety notices, labelling or warnings;
- (c) shipping and returns information including the cost and approximate timeframes;
- (d) price, including any taxes, in New Zealand Dollars;
- (e) any other information or attributes about the Merchant's Products that TheMarket may reasonably request from time to time.
- 8.4 The Merchant may only list Products in the most relevant category and cannot list any single Product in more than one category.
- 8.5 The Merchant may create a Merchant Promotion Coupon.
- 8.6 Where a Buyer applies a Merchant Promotion Coupon to an Order, the total Sale Proceeds for that Order will be reduced by the amount as specified in the Merchant Promotion Coupon (and the Merchant will bear the cost of such reduction).
- 8.7 The Merchant may offer Buyers a discount for Autoship Orders. Any discount applied to a Buyer's first Autoship Order will be applied to each subsequent Autoship Order until the Autoship is cancelled. The Merchant may change the Autoship discount offered at any time. The updated discount will apply to new Autoship Orders placed after the date that the discount is changed.
- 8.8 TheMarket may, at its sole discretion, create a Platform Promotion Coupon.
- 8.9 Where a Buyer applies a Platform Promotion Coupon to an Order, the total Sales Proceeds for that Order will be reduced by the amount as specified in the Platform Promotion Coupon. However, such reduction in Sales Proceeds will be borne solely by TheMarket in accordance with clause 14.1.
- 9. Purchase Process and Delivery**
- 9.1 TheMarket will notify the Merchant of a Buyer's validly submitted and paid Order (which constitutes an offer to buy from the Buyer). The Merchant must accept or reject the Order within 1 Business Day. If the Merchant does not respond within this period, the Order will be deemed to have been accepted by the Merchant.
- 9.2 The Merchant must Dispatch and deliver the Products that are in the Order in accordance with the SLA.
- 9.3 The Merchant may only deliver Orders to addresses in New Zealand.
- 9.4 The Merchant acknowledges that a Buyer may request to cancel an Order at any time before Products are Dispatched (**Buyer Cancellation Request**). The Merchant must accept or reject a Buyer Cancellation Request within 1 Business Day of receiving the request

- (i.e. by 1 pm on a (Business Day) Monday if received at 1pm on a (Business Day) Friday). Where a Buyer Cancellation Request is accepted by the Merchant, any payments made for the cancelled Order will be cancelled, or refunded to the Buyer. TheMarket will refund to the Merchant, any Commission that TheMarket has received for a buyer cancelled Order.
- 9.5 The Merchant must notify TheMarket once all Products within an Order have been successfully Dispatched or Merchant Cancelled (if unable to dispatch) at which point TheMarket will process payment in accordance with clause 14. The Merchant acknowledges that TheMarket will not process any payments for partially fulfilled Orders.
- 9.6 The Merchant must ensure that all Products that are subject to an Order are insured by the Merchant in full until delivery is made to the Buyer, or to TheMarket under clause 10.2, or to a MARKETPOINT point under clause 12, and will be liable for any loss or damage relating to such Products.
- 9.7 TheMarket may from time to time impose transaction limits on some or all Buyers and Merchants relating to the value of an Order, the cumulative value of Orders during a period of time, or the number of Orders per day or other period of time. TheMarket will not be liable to the Merchant if an Order is cancelled or stopped due to such Order exceeding any such limit.
- 9.8 The Merchant authorises TheMarket to process any Sales Proceeds from Buyers on the Merchant's behalf.
- 9.9 For clarity, TheMarket will not refund to the Merchant, or be obliged to refund to the Merchant, the Commission that relates to any Orders that are Merchant Cancelled.
- 10. Shipping**
- The Merchant can opt for TheMarket to ship Products for the Merchant on its behalf. Where it does so, the Shipping By Market terms in the link below will apply:
- <https://themarketmerchantsupport.zendesk.com/hc/en-nz/articles/21252314388761-SBM-Terms>
- 10.1 The Merchant will either:
- (a) transport the Products to TheMarket; or
  - (b) TheMarket (or its authorised representative) will collect the Products from the Merchant;
- in each case, for onwards distribution to a Buyer.
- 10.2 The Merchant is and remains responsible and liable for all loss or damage to Products until:
- (a) signature of collection or receipt of the Products from the Merchant is made by TheMarket, or its authorised representative (where the Merchant has required confirmation or collection or delivery by signature); or
  - (b) TheMarket confirms to the Merchant that the Products have been received from the Merchant (where the Merchant has not required confirmation of collection or delivery by signature).
- 10.3 TheMarket may refuse to ship Products for the Merchant at its sole discretion.
- 10.4 If the Merchant performs its own shipping of Products to Buyers:
- (a) it is responsible at all times for the cost and expenses relating to such shipping; and
  - (b) it is liable for all loss or damage to the Products until such Products are received by a Buyer; and
  - (c) it must deliver the Products to a Buyer in accordance with the SLA.
- 11. Subscription Model – free shipping for Buyers**
- 11.1 The Merchant acknowledges and agrees that Buyers who subscribe to the Subscription Programme are entitled to have free shipping on all Orders that meet the requirements (e.g. minimum spend) set by TheMarket from time to time (**Subscription Order**).
- 11.2 All of the Merchant's Products will be capable of being, or forming part of, a Subscription Order except bulk Products and other Products that TheMarket and the Merchant have agreed in writing are to be excluded from Subscription Orders.
- 11.3 All of the Merchant's Products which are eligible to be, or form part of, a Subscription Order will receive enhanced promotion on the Platform (as compared with products that are not subject to Subscription Orders).
- 11.4 The standard shipping cost of a Merchant's Products which are eligible to be, or form part of, a Subscription Order will be set to \$0.
- 11.5 Where a Buyer makes a Subscription Order, the Merchant may (but is not obliged to) request TheMarket to deliver the Products that are part of the Subscription Order on the Merchant's behalf (at the Merchant's expense using TheMarket's shipping pricing).
- 11.6 Where the Merchant arranges for delivery of a Subscription Order or Products which form part of a Subscription Order itself i.e. the Merchant does not arrange for TheMarket to deliver the Subscription Order using Shipping by Market or Fulfilled by TheMarket, TheMarket may credit a Shipping Subsidy to the Merchant in accordance with clause 14.1. Any such Shipping Subsidy must be agreed by the parties in writing in advance. If TheMarket credits a Shipping Subsidy to the Merchant, TheMarket will issue a Buyer Created Tax Invoice (where applicable) and the

Merchant agrees not to create its own Tax Invoice for the Shipping Subsidy.

## 12. MARKETPOINT (Pick Up Drop Off)

- 12.1 The Merchant acknowledges that Buyers can elect to have Orders shipped to a MARKETPOINT point for collection, and the Merchant must deliver the Products to the MARKETPOINT point in accordance with the delivery SLA.
- 12.2 TheMarket may specify which Products are eligible for MARKETPOINT and may, at its sole discretion, amend eligibility of Products at any time.
- 12.3 The Merchant is and remains responsible and liable for all loss or damage to Products until:
- (a) signature of receipt of the Products at the MARKETPOINT point (where the Merchant has required confirmation or collection or delivery by signature); or
  - (b) TheMarket confirms to the Merchant that the Products have been received at the MARKETPOINT point (where the Merchant has not required confirmation of collection or delivery by signature).
- 12.4 If a Buyer does not collect its Order within 10 Business Days of receipt at the MARKETPOINT point (**Uncollected Order**):
- (a) TheMarket will notify the Merchant;
  - (b) TheMarket will arrange for delivery of the Uncollected Order to TheMarket Central at TheMarket's cost;
  - (c) the Merchant will collect (or arrange for collection and delivery of the Uncollected Order) within 5 Business Days of notification under (a) above or as otherwise agreed;
  - (d) the Buyer will be refunded and the Merchant will not receive payment for the Order. Where the Merchant has already received payment for an Uncollected Order, TheMarket will deduct an amount equivalent to the payment for the Uncollected Order as an Approved Deduction in the next payment cycle. TheMarket will refund the Commission for the Uncollected Order.

## 13. Warehouse Group Discount Staff Benefit

- 13.1 Where the Merchant has opted for its Products to be subject to the Warehouse Group Discount Staff Benefit, the Merchant will comply with this clause 13 and any additional terms as provided by TheMarket from time to time.
- 13.2 Certain staff of TheMarket's Related Companies are able to apply for a discount (at the rate specified in the

Commercial Terms) on each of the Merchant's Products (**Warehouse Group Discount Staff Benefit**).

- 13.3 Where the Warehouse Group Discount Staff Benefit is applied to an Order, the total Sales Proceeds for that Order will be reduced by the amount as specified in the Commercial Terms (and the Merchant will bear the cost of such reduction).

## 14. Payments and payment processing

- 14.1 TheMarket will:
- (a) collect the Sales Proceeds from the Buyer;
  - (b) deduct from the Sales Proceeds:
    - (i) any Shipping Charges; and
    - (ii) any GST (if applicable),to get the value of **Net Sales**;
  - (c) add to the Net Sales:
    - (i) any Platform Promotion Coupon amount that has been applied to an Order; and
    - (ii) any Shipping Subsidy that has been agreed for the Order (provided that the Order is a Subscription Order that was delivered by the Merchant); and
  - (d) deduct from the Net Sales:
    - (i) the Commission;
    - (ii) any Approved Deductions;
    - (iii) the Fees;
    - (iv) the Merchant Marketing Contribution (if unpaid at this stage);
    - (v) any Refund Processing Fee;
    - (vi) the Merchant Indemnity Fund (if unpaid);
    - (vii) the Monthly Platform Fee; and
    - (viii) Shipping by Market delivery charges which are based on courier invoices. If there are any adjustments or late charges received from couriers these will be deducted from Net Sales in the next payment period.
  - (e) pay the remaining amount (**Net Proceeds**) to the Merchant and forward any GST to the Merchant, if the Merchant is responsible for remitting to the tax collection authorities under Clause 15; and



- (f) provide an itemised statement outlining the total value of the Order(s) and items above.
- 14.2 When a Buyer places a valid Order on the Platform for the Merchant's Products, the Merchant will be committed to fulfil the Order at the time the payment for the Products is received by TheMarket (subject to clause 9.4). TheMarket's total liability to the Merchant in respect of an Order shall be the amount actually received by TheMarket less any deductions as contemplated under clause 14.1 of this Agreement.
- 14.3 The Merchant acknowledges that TheMarket may allow Buyers to pay for Orders through a "buy now pay later" arrangement.
- 14.4 The Merchant will be liable for any and all service or transaction fees levied by the Merchant's bank, or any third-party payment gateway, in connection with any payments made by TheMarket to the Merchant.
- 14.5 Payments will be made to the Merchant's nominated bank account fortnightly within 3 Business Days from the 14th day and last day of every month (but may take some time to clear depending on the Merchant's bank). Where a fortnight's Net Proceeds are less than NZD\$100, payment will be withheld until the next fortnight in which total unpaid Net Proceeds are above NZD\$100.
- 14.6 Where the Merchant wishes to change its bank account details for payment, the Merchant must first verify its new bank account with TheMarket. No payments will be made to the Merchant's new bank account until it has been verified.
- 14.7 No interest is payable on any funds held by TheMarket.
- 14.8 If insufficient Net Sales are available for any Approved Deductions or other deductions under this Agreement, TheMarket may:
- (a) issue a letter of demand for the shortfall which must be paid in full within 5 Business Days of the date of the letter; or
- (b) deduct any outstanding amounts owing from the Merchant's future Net Sales.
- 14.9 All Net Proceeds due to the Merchant will be paid in the nominated Settlement Currency. Where the Settlement Currency is not New Zealand Dollars:
- (a) TheMarket will pay the Merchant based on a Foreign Exchange Market Rate sourced from a NZ registered bank on the date the payment is executed;
- (b) The Merchant is responsible for any transaction or other fees charged by its bank (including those relating to international transactions);
- (c) Any gain or loss on (a) will be retained by TheMarket as an FX margin.
- 14.10 TheMarket may deal with Sales Proceeds collected from Buyers as it wishes, and is under no obligation to hold or use Sales Proceeds in any particular way or account for any gains on Sales Proceeds.
- 14.11 Net Proceeds payable by TheMarket represent an unsecured claim against TheMarket and are not insured.
- 14.12 If TheMarket suspects fraudulent use of any Buyers Account or associated payment methods, TheMarket reserves the right to reject the Order and refund the amount. Where TheMarket rejects an Order due to suspected fraud, TheMarket will notify the Merchant. TheMarket will not be liable for any Orders cancelled by TheMarket under this clause 14.12.
- 14.13 The Merchant must pay to TheMarket a Monthly Platform Fee. The Monthly Platform Fee will be deducted from Net Sales in accordance with clause 14.1. The Monthly Platform Fee will be set to NZD\$49.00 per month (**Monthly Platform Fee**).
- 15. GST and Taxes**
- 15.1 Unless the Merchant notifies TheMarket in writing that it is an International Merchant pursuant to clause 16.1, the Merchant warrants that on the date of this Agreement and for so long as the Merchant sells Products on the Platform that it is tax resident in New Zealand for New Zealand GST purposes.
- 15.2 It is the Merchant's responsibility to calculate and determine and pay the amount of any necessary taxes (including GST) and Duties associated with the Merchant's use of the Platform. TheMarket bears no responsibility for, or liability to, the Merchant in relation to any taxes or Duties paid or payable in relation to the sale of the Merchant's Products.
- 15.3 The Merchant's sales price must include GST where applicable. The Merchant cannot add GST to Products after they have been bought or sold.
- 15.4 TheMarket's Fees and Shipping Charges include GST where applicable, and TheMarket is entitled to recover from the Merchant, and the Merchant must pay (in addition to any other consideration payable under this Agreement), the amount of any GST payable under the GST Act for any Taxable Supply made under this Agreement.
- 15.5 The Merchant agrees that TheMarket can issue Tax Invoices to Buyers on the Merchant's behalf with TheMarket acting as its agent.
- 15.6 Each party warrants that it is registered for GST (where applicable) and will notify the other if at any time it ceases to be registered for GST.
- 16. GST – International Merchants**
- 16.1 A Merchant that is an International Merchant will notify the TheMarket in writing at least 5 Business Days

	before the Commencement Date that it is an International Merchant.		accordance with the Consumer Guarantees Act 1993, the Fair Trading Act 1986 and the timeframes set out in the SLA. TheMarket does not take any responsibility for adjustments, refunds, credits or coupons.
16.2	Notwithstanding clauses 15.2 and 15.3, the parties agree that:		
	(a) TheMarket is an Electronic Marketplace;	17.3	Subject to clauses 3.5(g)(ii) and 17.4, TheMarket allows Buyers to return their Orders within 30 days of delivery under its "change of mind" policy. Where a Buyer has returned Orders (under the Standard Terms), the Merchant must notify TheMarket who will then provide a refund to the Buyer.
	(b) sales of the International Merchant's Products on the Platform will be subject to GST;		
	(c) subject to receiving notification from the International Merchant pursuant to clause 16.1, TheMarket will be responsible for the collection of GST on sales of imported Products on the Platform and remitting this amount to the Inland Revenue Department;	17.4	The "change of mind" policy does not apply to certain Products and can be found here <a href="https://help.themarket.com/hc/en-us/articles/360023456034&gt;Returns-Policy..">https://help.themarket.com/hc/en-us/articles/360023456034&gt;Returns-Policy..</a> The "change of mind" policy may be updated from time to time.
	(d) TheMarket will add GST to the sale price of the Merchant's Products sold on the Platform if they are provided to TheMarket in a foreign currency. Prices provided to TheMarket in New Zealand dollars will be deemed to be the GST inclusive price; and	17.5	Where TheMarket receives photo evidence from a Buyer that a Product was delivered broken or visibly damaged, and the value of the Product is \$50 or less, the Merchant authorises TheMarket to refund the Buyer for the Product without returning the Product. Where TheMarket receives photo evidence that the incorrect Product was received by the Buyer, and the value of the Product is \$20 or less, the Merchant authorises TheMarket to refund the Buyer without returning the Product.
	(e) TheMarket will not be responsible for calculating or determining or paying the amount of any other tax associated with the Merchant's use of the Platform, and TheMarket bears no responsibility for, or liability to, the Merchant in relation to any other taxes or Duties paid or payable in relation to the sale of the Merchant's Products.	17.6	Where a refund is to be made, TheMarket will either deduct any payments already made to the Merchant for the refunded product from the Merchant's future Net Sales (as an Approved Deduction) or demand that the Merchant pay the refunded amount to TheMarket within 5 Business Days. TheMarket will refund the Commission less the Refund Processing Fee.
16.3	The GST collected by TheMarket will not be reported to the Merchant.		
16.4	Orders may be stopped at the border and Duties, administrative fees, and further GST may be charged or levied. The parties agree that TheMarket is not responsible for any such additional charges.	17.7	For clarity, TheMarket will not refund to the Merchant, or be obliged to refund to the Merchant, the Commission that relates to any Orders that are Merchant Cancelled.
16.5	International Merchants must abide by any policies relating to applicable duties on the Merchant's Products which apply from time to time.	17.8	All refunds of, or adjustments to, an Order must be made through the Merchant Portal.
<b>17. Refunds, returns and warranties</b>		17.9	The Merchant must stipulate a return location in New Zealand or use TheMarket Central.
17.1	Each contract for the sale of Products using the Platform is between the Merchant and the Buyer. The Merchant is responsible for complying with the terms of such contract and with the Law associated with the advertising, marketing, supply, sale, import and export of the Products. Accordingly, but without limiting any other responsibilities the Merchant may have, the Merchant is the supplier (as defined in the Consumer Guarantees Act 1993) of the Products to Buyers, and is liable for all refunds, returns and warranty claims by Buyers.	17.10	The Buyer may ship a return Order to the return location specified by the Merchant as per clause 17.9 or drop the return Order at a MARKETPOINT network location.
		17.11	TheMarket is responsible for arranging delivery of any returned Order via its MARKETPOINT network to TheMarket Central at TheMarket's cost. However, if the reason for return is deemed to be the Merchant's error, and a local courier label is needed to be provided to the Buyer to return the Order, TheMarket will provide the courier label to the Buyer at a cost to the Merchant of \$2.95 excluding GST (non bulky items only).
17.2	Other than where TheMarket is expressed under this Agreement to provide refunds (in which case TheMarket will comply with its obligations under this Agreement, and Law), the Merchant must process all refunds, returns and warranty claims by Buyers in	17.12	The Merchant will periodically collect or arrange for collection and delivery of the returned Orders from TheMarket Central at a minimum of every 20 Business

Days at its cost or as otherwise agreed. TheMarket may offer bulk return shipping pricing to the Merchant for this purpose.

## 18. Customer Service

- 18.1 The Merchant must maintain a high level of customer service and must respond to TheMarket's inquiries about a Buyer's questions or complaints in accordance with the timeframes set out in the SLA.
- 18.2 Buyers will lodge any complaints they may have about an Order on the Merchant Portal. Upon receiving a Buyer's complaint, TheMarket will liaise with the Merchant and collect all the relevant evidence. TheMarket will then make a determination on how the Buyer's complaint will be resolved.
- 18.3 If TheMarket determines that a refund is the appropriate course of action (bearing in mind the Consumer Guarantees Act 1993 and other New Zealand consumer Law but also TheMarket's reputation and other factors), the refund will be applied to the Buyer and such amount deducted as an Approved Deduction in the next payment cycle.
- 18.4 The Merchant acknowledges that it is TheMarket's policy to be Buyer- friendly when making its determinations.

## 19. Indemnity Fund

- 19.1 TheMarket, at its sole discretion, may decide that the Merchant provides a security amount for costs and expenses that may arise against its Products (**Merchant Indemnity Fund**). The Merchant Indemnity Fund shall be equal to the amount set out in the Commercial Terms or as otherwise specified by TheMarket.
- 19.2 The Merchant irrevocably authorises TheMarket to deduct from the Merchant Indemnity Fund any amounts owing under this Agreement as a liquidated sum, for liabilities arising as a result of:
- (a) refunds TheMarket provides under this Agreement, the Policies or otherwise as required by Law; or
  - (b) any other loss, cost or liability that may arise as a result of the Merchant's conduct.
- 19.3 The Merchant Indemnity Fund is not held in trust and is intended to cover liabilities that arise against TheMarket for conduct by the Merchant as a liquidated sum.
- 19.4 The Merchant Indemnity Fund does not operate as a limitation of liability in favour of the Merchant and does not prevent TheMarket from recovering any loss from the Merchant that is not covered by the Merchant Indemnity Fund.

## 20. Intellectual Property Rights

- 20.1 Unless the Merchant has expressly rejected the right of TheMarket to use certain intellectual property in a prescribed way (as set out in Part C of the Commercial Terms), the Merchant grants to TheMarket, or will procure the grant, of a worldwide, royalty free, irrevocable, non-exclusive licence to use, reproduce, publish, communicate to the public, adapt, display, alter, amend, reformat and otherwise use the Merchant's marketing materials, including logos, trade marks, product images, descriptions and information provided to TheMarket or obtained by TheMarket from the Merchant's website or social media accounts (**Materials**) for the purposes of displaying and using such Materials on the Platform or in associated marketing materials advertising TheMarket, including the right to sublicense the rights in the Materials to any Related Companies, service providers and other users of the Platform for the purposes of merchandising and advertising the Merchant's Products and TheMarket itself, provided that TheMarket does not alter the Merchant's or its licensors' trade marks without the Merchant's express written permission.
- 20.2 The Merchant warrants that:
- (a) it has all necessary right, title and interest in the Materials to grant TheMarket the rights set out in clause 20.1; and
  - (b) TheMarket's use of the Materials as set out above will not infringe any third party's intellectual property rights.
- 20.3 The Merchant must not use any of TheMarket's intellectual property, including trade marks (both registered and unregistered), logos, artworks, copyright, designs, consumer driven content or any other intellectual property whatsoever without TheMarket's prior written approval.
- 20.4 Where third party rights owners make a claim against TheMarket, or any of TheMarket's Related Companies, in relation to any Material, content, Product or any other material listed, posted, displayed, published or conveyed on the Platform (**IP Claim**) the parties will follow the following claim process (**Claim Process**). Where a third party makes an IP Claim:
- (a) the party receiving the IP Claim will notify the other party that there is an IP Claim, and provide the other party with the relevant details of the IP Claim;
  - (b) the items subject to the IP Claim may be suspended, removed or modified during the investigation and resolution process until both the Merchant and the claimant inform TheMarket in writing that the IP Claim is resolved; and
  - (c) TheMarket will not be liable for any loss of sales, account suspension or cancellation arising as a result of any IP Claim.

20.5 The Merchant grants to TheMarket and its Related Companies a non-exclusive and irrevocable right to use at its discretion, data obtained from the Platform and the Alternative Platform both during and after the Term.

## 21. Privacy and Personal information

21.1 The Merchant agrees to maintain its own privacy policy that will apply between itself and the Buyer. Such privacy policy must comply with the Privacy Act 2020 and be substantially the same as the Privacy Policy.

21.2 The Merchant must ensure that if it collects, uses, stores, or discloses personal information (as defined in the Privacy Act 2020) relating to a Buyer it:

- (a) complies with the terms of this Agreement, the Privacy Policy, Privacy Act 2020, and any other applicable privacy laws to which it is subject; and
- (b) does not do or omit to do anything that may cause TheMarket to breach its obligations under the Privacy Act 2020.

21.3 The Merchant must not, and ensure that its employees, officers, agents, or Related Companies do not, directly or indirectly disclose any personal information about any Buyer (including a Buyer's name, address, email address, contact number or Order history) to any third party unless such disclosure is necessary for the performance of its obligations under this Agreement or as otherwise required by Law. The Merchant must ensure that any third party to which it discloses personal information in accordance with this clause:

- (a) is obliged not to use or disclose the personal information except as authorised by the Merchant; and
- (b) is bound by substantially similar or no less onerous privacy obligations to those contained in this Agreement and the Privacy Act 2020.

The Merchant will remain responsible to TheMarket for the third party's acts and omissions in relation to the processing of personal information about a Buyer.

21.4 The Merchant must take all reasonable steps to implement and maintain best practice safeguards to ensure that all personal information relating to a Buyer is protected against misuse, loss and any unauthorised access, modification or disclosure.

21.5 The Merchant must take reasonable steps to ensure that personal information about a Buyer is accurate, up to date, complete, relevant and not misleading before using it.

21.6 The Merchant agrees that it will promptly and securely delete personal information relating to a Buyer once it is no longer reasonably required by the Merchant for any use permitted under this Agreement.

21.7 The Merchant acknowledges and agrees that each Buyer to whom personal information relates has a right to access, and to seek correction of, their personal information and the Merchant will comply with any such request from a Buyer in accordance with the rights and obligations prescribed by the Privacy Act 2020.

21.8 If the Merchant becomes aware of any security breach or actual, attempted or suspected unauthorised, unlawful or accidental access to, use, modification or disclosure, alteration or damage of any personal information (including any action that prevents the Merchant from accessing personal information) (**Data Breach**), it must as soon as practicable and in any case within 24 hours, give TheMarket notice of the full details of the Data Breach. Such notification will, at a minimum:

- (a) describe the nature of the Data Breach, the type of personal information affected, and the numbers of affected individuals;
- (b) the name and contact details of the relevant Merchant contact from whom more information may be obtained;
- (c) describe the likely consequences of the Data Breach; and
- (d) describe the measures taken or proposed to be taken by the Merchant to address the Data Breach, including, where appropriate, measures to mitigate its possible adverse effects.

21.9 The Merchant will comply with and fully co-operate and assist in the investigation, mitigation and remediation of any Data Breach (including fulfilling any entitlements or remedies available to individuals under the Privacy Act 2020) and with any requests for information or investigations launched by TheMarket or any applicable regulator.

21.10 The Merchant agrees to promptly notify TheMarket:

- (a) if it is, or becomes, subject to any law that could reasonably have an adverse effect on the protections contained in this clause 21; and
- (b) if it is required to use or disclose personal information relating to a Buyer in a way that would otherwise not be permitted under this Agreement.

## 22. Disclaimer and Liability

22.1 To the maximum extent possible at Law, TheMarket, and any of TheMarket's Related Companies, will not be liable to the Merchant or any other person for any loss or damage relating in any way to the Platform including any loss, cost, liability, expenses or damages suffered as a result of:

- (a) omissions, errors, mistakes or inaccuracies on the Platform or associated social media pages;
- (b) acting (or not) on any information published on the Platform and/or any associated websites and social media pages;
- (c) unauthorised access to or use of TheMarket's, and any of TheMarket's Related Companies', secure servers;
- (d) any loss of or damage to any data stored in the Platform or associated systems;
- (e) any business interruption or failure of transmission to or from the Platform; and/or
- (f) any bugs, viruses, or other harmful code or communications which may be transmitted to or from the Platform by any third party.

22.2 The Platform is provided on an 'as is' and 'as available' basis, and neither TheMarket nor any of TheMarket's Related Companies make any representations or warranties of any kind, express or implied, including any implied warranties of fitness for a particular purpose, merchantability, or non-infringement of third party rights. Implied warranties arising from TheMarket's dealings or normal trade usage are expressly excluded. The Merchant acknowledges and confirms that it enters into this Agreement based on its own investigations.

22.3 The parties acknowledge that both parties are in trade, the Platform is provided for a business purpose, and accordingly the parties agree that the provisions of the Consumer Guarantees Act 1993, and sections 9, 12A, 13 and 14(1) of the Fair Trading Act 1986, are specifically excluded between them.

22.4 To the maximum extent possible at Law, and however arising out of or in connection with the Platform or this Agreement (including negligence), in no event shall TheMarket, TheMarket's Related Companies or TheMarket's suppliers be liable for any special, indirect or consequential loss or damage or for any loss of data, loss of profits, loss of anticipated savings, loss of future earnings, loss of opportunity or loss of goodwill, however incurred, whether direct or indirect. The Merchant agrees to accept sole responsibility for the legality of its actions under all Laws. The Merchant agrees that TheMarket, its Related Companies and suppliers have no responsibility for the legality of the Merchant's actions.

22.5 To the maximum extent possible at Law, and however arising out of or in connection with the Platform or this Agreement (including negligence), in no event shall TheMarket, TheMarket's Related Companies or TheMarket's suppliers be liable in the aggregate for any loss exceeding the amount of any Net Proceeds due, plus \$5,000.

## 23. Indemnity and Release

23.1 The Merchant indemnifies TheMarket and its officers, employees and Related Companies against any costs, losses, damages, liabilities and expenses (including legal costs and expenses on a full indemnity basis) suffered or incurred by TheMarket and its officers, employees, and Related Companies arising out of or in connection with:

- (a) improper use of the Merchant's Account;
- (b) the Merchant's breach of any of the terms of this Agreement;
- (c) any IP Claim relating to the Materials (where TheMarket has not caused the IP Claim through any breach of this Agreement); or
- (d) any conduct or any transaction entered into by the Merchant that does not comply with any Law.

23.2 Notwithstanding clause 9.8, TheMarket is not party to the transactions between the Merchant and a Buyer of the Merchant's Products using the Platform.

## 24. Termination

24.1 Following the expiry of the Initial Term, either party may terminate this Agreement for convenience by giving the other 30 days' notice in writing.

24.2 Either party (**First Party**) may terminate this Agreement immediately by written notice to the other party (**Second Party**) if the Second Party:

- (a) commits a material breach (which is incapable of remedy) of this Agreement;
- (b) commits a material breach (which is capable of remedy) of this Agreement and the Second Party has failed to remedy the same within 14 days of receipt from the First Party of a notice giving details of the material breach and requiring it to be remedied; or
- (c) the Second Party:
  - (i) is, becomes, or is deemed to be, insolvent or bankrupt;
  - (ii) makes an assignment for the benefit of, or enters into or makes any arrangement with its creditors; or
  - (iii) goes into receivership or has a receiver, trustee and manager (or either of them) (including a statutory manager) appointed over all or any of its property; or
  - (iv) suffers an event analogous to sub-clauses (i) to (iii).

24.3 In the event of termination for any reason, the following applies:

- (a) all monies owed to TheMarket will become due and payable;
- (b) all listings will be removed from the Platform;
- (c) all outstanding Orders must be Dispatched and delivered to the Buyer within the timeframes specified in the SLA;
- (d) any outstanding returns and queries must be immediately resolved; and
- (e) once the above items have been completed to TheMarket's satisfaction, TheMarket will make a final net settlement of any outstanding funds that are owed to the Merchant, less any Shipping Charges, any GST, any Refund Processing Fee, any Commission, any Approved Deductions, any Fees, any Merchant Marketing Contribution (if unpaid) and any Monthly Platform Fee and shut down the Merchant's Account.

## 25. Survival Clauses

25.1 Notwithstanding any termination or expiry of this Agreement, the following clauses shall continue to apply: clauses 1, 17, 20, 21, 22, 23, 25, 29, 30, 33, 34 and 35, together with any clauses that by their nature are intended to survive.

## 26. Changes to these terms and conditions

- 26.1 Except in relation to any change in the Commission (see clause 5.4), TheMarket may amend this Agreement at any time. Such changes will be notified to the Merchant via the Merchant Portal and will come into effect 20 Business Days' after such notification. TheMarket is able to vary this Agreement without reference to the Buyer on whom this Agreement is intended to confer a benefit.
- 26.2 The Merchant must ensure it remains compliant with the latest version of this Agreement, the Standard Terms, the Policies and the Privacy Policy. Subject to any other provision set out in this Agreement, continued use of the Platform by the Merchant after the notification period set out above will constitute the Merchant's acceptance of any amendments.

## 27. Entire Agreement

27.1 This Agreement, the Standard Terms, Privacy Policy and all other Policies incorporated by reference in this Agreement, form the entire agreement between the Merchant and TheMarket in relation to the subject matter of this Agreement, and supersede all prior agreements, representations and understandings between TheMarket and the Merchant, whether written or oral.

## 28. Severability

28.1 If any provision of this Agreement is deemed to be unlawful or otherwise unenforceable, that provision shall be read down or severed from these terms and shall have no effect on the remaining terms of this Agreement.

## 29. Waiver

29.1 TheMarket's delay or omission to enforce or exercise a right under this Agreement shall not constitute a waiver of that right unless expressly waived in writing by TheMarket.

## 30. Resolution of disputes

30.1 In the event of a dispute arising between the parties in connection with this Agreement, the party initiating the dispute must give written notice of the dispute to the other party and those parties must as soon as practicable meet and discuss the dispute in good faith to settle the dispute.

30.2 If the dispute cannot be settled within 10 Business Days of notice having first been given under clause 30.1, either party may give written notice to the other that it requires the dispute to be determined by mediation. The mediation shall be conducted on the following terms:

- (a) the place of mediation will be Auckland, New Zealand;
- (b) the mediation will be conducted on the terms of the Resolution Institute standard mediation agreement (NZ version);
- (c) the mediator must be agreed by the parties or, if the parties cannot agree on a mediator within five days after the notice has been given, then the parties shall promptly request the chairperson of Resolution Institute (or his or her nominee) to select the mediator; and
- (d) unless otherwise resolved, the costs and expenses of the mediator shall be shared by the parties equally.

30.3 Nothing in this clause 30 will preclude a party from taking immediate steps to seek an injunction from an appropriate court.

## 31. Relationship of Parties

31.1 TheMarket and the Merchant are independent contractors, and nothing in this Agreement will create any partnership, joint venture, agency, franchise, sales representative, or employment relationship between the parties. The Merchant will have no authority to make or accept any offers or representations on TheMarket's behalf. This Agreement will not create an exclusive relationship between TheMarket and the Merchant.

**32. Assignment**

32.1 The Merchant may not assign this Agreement, by operation of law or otherwise, without TheMarket's prior written consent. A change of effective control of the Merchant will be deemed an assignment. Subject to that restriction, this Agreement will be binding on, and be enforceable against the parties and their respective successors and assigns.

**33. Confidentiality**

33.1 Each party shall maintain as confidential at all times and shall not at any time directly or indirectly disclose or permit to be disclosed to any person, or use for itself, or use to the detriment of the other party any Confidential Information except:

- (a) as required by Law; or
- (b) as is already or becomes public knowledge, otherwise than as a result of a breach of this Agreement; or
- (c) as authorised in writing by the other party; or
- (d) to such of its personnel, personnel of its Related Companies, officers or professional advisers, on a "need to know" basis, as is reasonably required in order to perform its obligations under this Agreement (for example for financial or audit purposes).

33.2 The Merchant agrees that all Confidential Information of TheMarket will remain TheMarket's exclusive property.

33.3 The parties agree to exercise all due care and diligence to ensure Confidential Information is treated in strictest confidence, applying the same standard of care as is the greater of best industry practice of the standard of care that the party exercises for its own information of a similar nature and sensitivity.

33.4 The Merchant will ensure that its relevant personnel and advisors are made aware of and are bound, in writing, to comply with substantially the same obligations in respect of Confidential Information as those imposed on the Merchant under this Agreement.

**34. Remedies cumulative**

34.1 The rights, powers and remedies set out in this Agreement are cumulative and are not exclusive of other any rights, powers or remedies provided by Law or under this Agreement. The exercise of any of the rights, powers and remedies provided in this Agreement will not prejudice the exercise of any other right, power or remedy under this Agreement or existing at Law.

**35. Governing law**

35.1 This Agreement is legally binding on both TheMarket and the Merchant and is governed by the laws of New Zealand. Subject to clause 30, the parties submit to the non-exclusive jurisdiction of the courts of New Zealand in respect of any dispute or proceeding arising out of this Agreement.

## Schedule A – Service Level Agreement

Policy Details	Merchant SLA (minimum standards)	
<p><b>Time-to-Ship for all Merchants</b></p> <p>It is important that Merchants process Orders on TheMarket in a timely manner. A monthly performance monitor will be applied and advised each month, and if the metric is under SLA and not corrected in the following month, the Merchant may be restricted from selling on Platform.</p>	<p>All Merchants – Time to ship from Order:</p> <p><b>36Hours/1.5 days average per month</b></p> <p>Based on all days, including non-Business Days.</p> <p>All services must be fully tracked with tracking numbers provided to TheMarket.</p>	
<p><b>Delivery Standards for all Merchants, origin:</b></p>	<p><b>Service Type</b></p>	<p><b>Average Time Frame Including rural and weekends</b></p>
<p><b>New Zealand</b></p>	<p><b>Standard</b></p>	<p><b>4</b></p>
	<p><b>Express</b></p>	<p><b>2</b></p>
<p><b>Australia</b></p>	<p><b>Standard</b></p>	<p><b>11</b></p>
	<p><b>Express</b></p>	<p><b>3</b></p>
<p><b>United Kingdom</b></p>	<p><b>Standard</b></p>	<p><b>12</b></p>
	<p><b>Express</b></p>	<p><b>4</b></p>
<p><b>All other international</b></p>	<p><b>As advertised:</b> Days to deliver advertised on Product descriptions</p>	
<p><b>Adherence to advertised timeframes</b></p>	<p><b>95% of Orders must be delivered within the advertised timeframes. TheMarket reserves the right to suspend any Merchant who fails to meet this SLA repeatedly.</b></p>	
<p><b>Cancellation</b></p> <p><u>Merchant Initiated:</u></p> <p>The Merchant can cancel Orders (or individual Order lines) at any time before the Order is shipped.</p> <p><u>Buyer Initiated:</u></p> <p>Buyers can request Order cancellation any time before an Order is shipped. The Merchant must approve/reject a Buyer Cancellation Request within 1 Business Day of receiving the request.</p> <p>Conditional promotions (e.g. spend \$200 to get \$20 off) are automatically reversed for Buyer initiated partial cancellations if the remaining Order value no longer qualifies for the promotion.</p>	<p><b>Merchant Cancellation Rate</b></p> <p>Merchant initiated cancellation rate must be less than 2.75%. Calculated as total Order lines cancelled / total Order lines.</p> <p><b>Buyer Initiated Cancellations</b></p> <p>The Merchant must respond to 95% of Buyer Cancellation requests within 1 Business Day of receiving such requests.</p>	



<p><b>Returns</b></p> <p>Our system has a 2-step return process:</p> <p><b>Step One:</b></p> <p>The Buyer creates a return request (<b>RMA</b>) which TheMarket, after liaising with the Merchant where necessary, either authorises (e.g. physically accepts return for assessment or issues return shipping instructions to the Buyer) or rejects (e.g. informs the Buyer that the return period is closed for non-faulty Products).</p> <p><b>Step two:</b></p> <p>There is a physical assessment of the returned Product (<b>Return Assessment</b>) (performed by TheMarket or the Merchant as agreed between the parties) to determine whether the Buyer is eligible for a refund or a replacement.</p> <p><b>Consumer Initiated:</b></p> <p>Any Buyer-initiated RMA within 30 days (from receipt of the Order), which is not a restricted return item and for which TheMarket receives photo evidence that the item was delivered broken or visibly damaged with a value of \$50 less, or photo evidence that the incorrect item was received by the Buyer with an item value of \$20 or less, is automatically authorised by TheMarket for refund without return of the item.</p> <p>In all other cases, the Buyer can only request returns for Orders older than 30 days if Products are faulty, or in line with the “change of mind” policy: <a href="https://help.themarket.com/hc/en-us/articles/360023456034&gt;Returns-Policy">https://help.themarket.com/hc/en-us/articles/360023456034&gt;Returns-Policy</a>.</p> <p>RMAs must be individually authorised by TheMarket (after liaising with the Merchant where necessary). Once authorised returns are received by TheMarket or the Merchant (as agreed by the parties) the Return Assessment must be undertaken and the return must be approved or rejected by TheMarket.</p> <p><b>Merchant Initiated:</b></p> <p>The Merchant can initiate returns for faulty Products in accordance with its recall policy and in compliance with TheMarket’s Recall Policy set out at: <a href="https://help.themarket.com/hc/en-us/articles/10539878895257">https://help.themarket.com/hc/en-us/articles/10539878895257</a>.</p>	<p>Return Assessment and acceptance/rejection – 95% within 2 Business Days from receipt of Product (if Return Assessment is to be undertaken by the Merchant).</p> <p>Dispute question response (if TheMarket requires further information from the Merchant regarding a dispute) – 99% within 2 Business Days from request for information.</p>
<p><b>TheMarket initiated:</b></p> <p>TheMarket can initiate returns for faulty Products in accordance with its recall policy.</p>	
<p><b>Customer Service / operations</b></p>	<p>Merchants’ response time to the Market Customer Service and Operational enquiries: <b>1 Business Day</b></p> <p><b>If the metric is under SLA, TheMarket may restrict Merchant from selling on Platform.</b></p>